Supreme Court, U.S.
FILED
DEC 7 - 2009
OFFICE OF THE CLERK

No. 09-555

In The Supreme Court of the United States

TERRY ASHABRANNER,

Petitioner,

vs.

JEANETTE GOODMAN, Individually and as Administratrix of the Estate of Michael Goodman, Deceased,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSTITION TO TERRY ASHABRANNER'S PETITION FOR WRIT OF CERTIORARI

NEWTON B. SCHWARTZ, SR.
(Counsel of Record)
MARTINA E. CARTWRIGHT
JAMES T. STEGALL
LAW OFFICES OF NEWTON B. SCHWARTZ, SR.
1911 S.W. Freeway
Houston, Texas 77098
Tel: (713) 630-0708
Fax. (713) 630-0789

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Respondent Jeannette Goodman (hereinafter "Goodman") disputes Petitioner Terry Ashabranner's (hereinafter "Ashabranner") Statement of the Case, which is replete with disputed facts and arguments presented at trial and soundly controverted. For a more accurate and succinct recounting of the case history, Goodman refers this Court to her Petition for Writ of Certiorari. No. 09-574.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

1. The Court of Appeals was correct in finding that the Trial Court did not abuse its discretion in admitting the testimony of Tarnow as Goodman had met the applicable criteria of Fed. R. Civ. P. 35(a)

Fed. R. Civ. P. 35(a) provides:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist. . . . The order may be made only on motion for good cause shown. . . .

In *Schlagenhauf v. Holder*, this Court emphasized the limited circumstances under which a court may order mental or physical examinations:

> [S]weeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged. Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.

379 U.S. 104, 121-22 (1964)

Under Rule 35, three requirements are necessary to enable a court to order a Rule 35 exam: (1) the party's physical or mental condition must be in controversy; (2) the expert must be either a physician or a psychologist; and (3) good cause must be shown. Each of these requirements was met by Goodman.

A. Ashabranner's mental condition was in controversy, particularly when he sought to justify his unreasonable actions by focusing on the mental state of the decedent

The trial court's decision to level the playing field, particularly when Ashabranner sought to make an issue of the decedent's mental condition, resulted in its decision to grant Goodman's Rule 35 motion. (R. 770) In essence, Ashabranner sought to justify his actions by providing the trial court with a psychiatric history and profile of the decedent, by and through, Dr. James L. Claghorn – a licensed psychiatrist, not psychologist. (R. 716-17)

As the trial court noted in its order:

"If the Defendants propose to try this case by establishing what likely happened based on psychiatric testimony then both sides should be able to avail themselves of that opportunity." (R. 770) Ashabranner immediately appealed the trial court's decision, which was ultimately dismissed by this court on jurisdictional grounds. *Goodman v. Harris County*, 443 F.3d 464 (5th Cir. 2006).

Inexplicably though, during the pendency of that appeal, the trial court granted Goodman's motion to exclude the testimony of Dr. Claghorn. (R. 1296)

However, the decedent's mental state remained a target at trial. For instance, a substantial amount of medical records relating to the decedent's mental

health history was admitted into evidence by the court. (R. 4349-50, 52-53, Def's Ex. 37)

Additionally, Ashabranner sought to elicit extensive testimony on the issue of the decedent's attention deficit hyperactivity disorder and other related psycho-social conditions (R. 4866-68, 4870). Clearly then, fair play and justice dictated that if the decedent's mental status be presented to the trial, no less than Ashabranner's should be provided the jury, as well.

Once Goodman met the strict requirements of Fed. R. Civ. P. 35(a), the court still had the discretion to deny Goodman's motion. However, the trial court clearly recognized the value of allowing Goodman to present testimony on the mental status of Ashabranner, particularly if the decedent's history would become a focal point of Ashabranner's case. The Court of Appeals clearly agreed with this rationale, holding that the trial court did not abuse its discretion in allowing this testimony.

B. Undisputed that Tarnow was a licensed psychiatrist

Fed. R. Civ. P. Rule 35 authorizes a mental examination only by a physician or a psychologist.

It is undisputed that Tarnow was a licensed professional, capable of conducting a full assessment of Ashabranner. (R. 4755-57) Indeed, the Court of Appeals found that Ashabranner did "not challenge

Dr. Tarnow's qualifications or methodologies." Appendix A, p. 18a.

C. Good cause was demonstrated by Goodman, clearly recognized by the trial court, and affirmed by the Fifth Circuit Court of Appeals

Good cause for an examination clearly existed and was ably demonstrated by Goodman, particularly when she presented the trial court with sufficient evidence, demonstrating Ashabranner's intent to make the decedent's mental state an issue.

i. Dr. Tarnow's testimony was probative, relevant to the inquiry and did not exceed the scope of his expert testimony

In his discussion, regarding the alleged prejudicial effect of Tarnow's testimony, Ashabranner invites this court to consider the holding in *Nichols v. American National Insurance Co.*, whereby the Eight Circuit Court of Appeals reversed the judgment on a jury verdict for the defendant and remanded the case for a new trial, in part because of the testimony of a psychiatrist called by the defense. 154 F.3d 875 (8th Cir. 1998).

One of the central issues on appeal in that case was whether the expert in question was permitted to testify beyond the proper scope of expert opinion to

testify about the plaintiff's veracity and credibility. *Id.* at 882.

The court fully considered the psychiatrist's testimony before finding that it did not comport with the fundamental guidelines for expert testimony. *Id.* at 882-884.

The court, citing Fed. Rules of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] noted that: "Before admitting proffered expert testimony, the trial court must ensure that it is scientifically valid – that it is both reliable and relevant." *Id.* at 883.

Ultimately, the court found that the challenged testimony, impugning the plaintiff's psychiatric credibility and suggesting that recall bias, secondary gain, and malingering had influenced her story, was not a proper subject of expert testimony under Fed. R. Evid. 702 because the record did not demonstrate that these theories met the relevant and applicable *Daubert* criteria. *Id.* at 884.

In the instant matter, Dr. Tarnow's testimony met the *Daubert* criteria and was both relevant and reliable. Tarnow's initial testimony focused exclusively on the diagnostic measures employed by his associate, Dr. Sophie Havasay, in her examination of Ashabranner. (R. 4758-59, 4761-63) His subsequent testimony focused on his own examination of

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[1] 509 U.S. 579 (1993).

Ashabranner, before he provided the jury with an overview of his findings. (R. 4774-77)

In stark contrast with *Nichols*, Tarnow did not attempt to characterize Ashabranner. He simply presented the results of numerous objective tests, as well as his individual examination and observations of Ashabranner. Undeniably, Tarnow's "descriptions" related to his perceptions of Ashabranner's behavior during his examinations, rather than an attack on Ashabranner's credibility. Indeed, the Court of Appeals found that the greatest damage done to Ashabranner by Tarnow was the "observed inconsistencies in Ashabranner's account of the night he shot Michael and that Ashabranner exhibited anger-management problems and impulsive behavior." Appendix A, p. 19a.

The Court ultimately concluded that "Tarnow merely recounted what Ashabranner had described and gave his medical opinion on the psychological underpinnings of those descriptions." *Id.* And unlike the testimony presented in Nichols, Tarnow did not opine "that Ashabranner was lying . . . he only presented the jury with the fact that he observed inconsistencies." *Id.*

As such, Tarnow's testimony satisfied the requirements of Daubert and was both reliable and relevant and the Court of Appeals was correct in finding that the trial court did not abuse its discretion in admitting Tarnow's testimony.

2. The Court of Appeals was correct in finding that, even if Tarnow's testimony exceeded its proper scope, any error was "harmless"

Ashabranner argues that the admission of Tarnow's testimony was prejudicial and harmful. As in his argument before the Court of Appeals, Ashabranner provides little evidence to support this argument. Indeed, he appears to argue that, but for Tarnow's testimony, the jury would have likely found for Ashabranner. That position is untenable in light of the overwhelming "forensic, physical, and medical evidence" contradicting Ashabranner's account. Appendix A, p. 19a.

With the exception of Ashabranner's self-serving testimony, there was no evidence presented by Ashabranner to support his account of the events of April 14, 2002. Indeed, his own testimony was replete with inconsistencies often contradicted by the physical evidence. For instance, Ashabranner claimed that:

- His investigatory stop/detention of the decedent was on the shoulder of a dark, heavily wooded four lane highway, with little ambient light. (R. 4531-32)
- While standing perpendicular to the decedent's left, Ashabranner viewed a shiny, object in decedent's right rear pocket or waistband, an area pocket conceivably obscured by a large duffle bag. (R. 4447-48, 4459, 4536)

- While standing to the LEFT of the decedent, attempting to reach for the shiny object he spied in decedent's RIGHT rear pocket, the decedent assaulted him. (R. 4535, 4538)
- The decedent fled into or onto a wooded easement. (R. 4417, 4544-46)
- The decedent, after being repeatedly bitten, attempted to drown Nero, a canine. (R. 4546-49)
- He wrestled with decedent, in an attempt to free his canine, and handcuff him. (R. 4549-51)
- Decedent assaulted Ashabranner a second time and then attempted to reach, with his right hand, for his right rear pocket. (R. 4552)

First and foremost, Ashabranner's position, during his first encounter when he attempted to frisk or pat down the decedent, would have made it impossible for him to see a shiny, metallic object in the decedent's right rear pocket. He would literally have to be able to see around a corner. Second, the lighting conditions on the night in question would have made it a near impossibility for Ashabranner to observe a small, shiny object tucked into the decedent's right rear pocket. According to Ashabranner, though having two flashlights on his person, he did not use either one. (R. 4551) Additionally, the position of Ashabranner's vehicle – facing towards the easement and several yards away from the decedent's initial position by the side of the road – did not allow for

much, if any light. (R. 4384) Moreover there were no overhead or streetlights on the street in question. (R. 4405, 4531-32) Finally, according to Ashabranner, the decedent was carrying a large, duffel bag over his right shoulder, draping down low on the decedent's person, covering his right rear pocket. (R. 4402-03)

After shooting the decedent, despite the potential threat he posed, Ashabranner did not attempt to secure the decedent or ensure that he did not still have access to a weapon. Instead, he walked away – to focus on checking his dog and calling EMS. (R. 4553) He left the decedent "laying on his back" conceivably, still in position to grab a weapon and harm him. (R. 4553, 4640-41)

Additionally, there was very little objective evidence to support Ashabranner's account. For instance, Ashabranner testified that he engaged in a violent altercation with the decedent in a wet and muddy area of the easement. However, the evidence he offered – photographs of the condition of his clothes following the shooting – did not support his contentions. (R. 4451, 4453-54)

Ashabranner wrongfully asserts that the key evidence supporting the Court of Appeals decision was accounts regarding the decedent's use of his dominant right arm.

For the record, Goodman presented at trial x-rays – demonstrating the injury to decedent's

dominant right arm from being shot. (Pltfs. Ex. 17)[2] Notably, Ashabranner did not attack those records, but focused on the testimony of two individuals who could best qualify whether or not the decedent had any use of his dominant right arm.

Ashabranner argues that testimony by the Respondent and the decedent's friend, Dustin Kelly, that the decedent did not have a lot of use for his right arm was "speculative at best." However, that statement flies in the face of the evidence provided by Goodman regarding the nature of the incident when the decedent was shot, as well as the extremely limited use of his dominant right arm up to and including the time he was shot by Ashabranner. (R. 4830-32) The decedent's friend and co-worker, Dustin Kelly, testified that he observed the decedent on numerous occasions and had firsthand knowledge that the decedent had "little use out of" his dominant right arm. (R. 4730) He testified that while he allowed the decedent to work with him, "to just to put something in his pocket" . . . he "just – he wasn't much good. You know, he could sweep the floors. He was a gofer. You know, go get me this. Go get me that. That's all he was good to me for." (R. 4730) Kelly testified that a number of times following the shooting, the decedent would have his arm in a

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[2] There was also testimony from the medical examiner, who admitted that x-rays of the decedent's body revealed that the fracture in the decedent's right humerus had not yet fully healed. (R. 5141-42)

sling "because it hurt." (R. 4731) Most important, however, was that Kelly was the last person to see the decedent the night before he was killed and was well aware of the decedent's limitations up to and including the night of his death. (R. 4733, 4742-43, 4747, 4754) Finally, based on what Kelly knew of the decedent – and the use (or lack of use) of his right arm – it would have been impossible for him to "push another person" or "wrestle[d] with" a rabid sixty-five pound dog. (R. 4731-32)

Tarnow's testimony may have been considered by the jury in its decision to find for Goodman. However, just as likely, Tarnow's testimony may have been disregarded or minimized by the jury in light of the overwhelming physical evidence demonstrating that Ashabranner did use deadly force in violation of the decedent's Fourth Amendment rights.

Accordingly, the Court of Appeals correctly found that Ashabranner had not suffered substantial prejudice.

CONCLUSION

For all the foregoing reasons, Terry Ashabranner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

NEWTON B. SCHWARTZ, SR.
(Counsel of Record)
MARTINA E. CARTWRIGHT
JAMES T. STEGALL
LAW OFFICES OF NEWTON B. SCHWARTZ, SR.
1911 Southwest Freeway
Houston, Texas 77098
Tel: (713) 630-0708
Fax: (713) 630-0789

Attorneys for Respondent